

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8215 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

KAMLESH BHOGILAL MISTRI: Petitioner.

Versus

POLICE COMMISSIONER & Ors.: Respondents.

Appearance:

MR IM PANDYA for Petitioner
Mr. U.R. Bhatt, APP for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 05/02/98

ORAL JUDGEMENT

By this application under Article 226 of the Constitution of India, the petitioner who is the detenu calls in question the legality and validity of the detention order passed by the Commissioner of Police, Ahmedabad city on 30th September 1997 invoking the powers under Section 3 (2) of the Gujarat Prevention of Anti-Social Activities Act (hereinafter referred to as 'the Act').

2. The facts in brief leading the present petitioner to prefer this application may be stated. About 7

complaints regarding car theft or car-taps thefts came to be lodged in Sardarnagar police station, Naroda police station and Thara police station of Banaskantha District. In the complaint in Thara police station, it is alleged that the petitioner was having a tamancha, knife, sword, stick, wire-cutter etc., and he committed the offences punishable under Sections 120-B Indian Penal Code, 135 Bombay Police Act and 25 (1)(a) Arms Act. The police Commissioner when made the extensive study perusing the record he found that the petitioner was a head-strong person i.e., a tartar & decimator and by criminal activities he was terrorising the people. He was extorting money, causing injuries and/or causing damage to the properties. By diabolism, he used to cause the people to bend his way. His hellish and infernal activities disturbing public order were going berserk. No one was, therefore, ready to come forward and state against him. After a great persuasion and when assurance was given that the facts about them disclosing their identity would be kept secret, some of the witnesses have under great tension stated against the petitioner. After a deep inquiry, the Police Commissioner found that to curb the anti-social, subversive and chaotic activities of the petitioner, unspeakable diabolism terrorising the society, and upsetting the public order and leading to anarchy, ordinary law was falling short and was sounding dull. The only way out to hold him in kittle was to detain him under the Act. He, therefore, passed the impugned order. Consequent upon the same, the petitioner came to be arrested and at present, he is in custody.

3. On behalf of the petitioner, challenging the impugned order, it is submitted that the order in question is passed after a great delay, as a result, the continuous detention has been rendered illegal. There was no justification for the authority passing the detention order withholding particulars, exercising the privilege under Sec.9(2) of the Act. The detaining authority ought to have disclosed the particulars of the witnesses whose statements were recorded in support of the order passed. No doubt, under Section 9 of the Act, the authority has the privilege, but that is to be exercised judiciously, and not arbitrarily or capriciously so as to deprive the detenu of his right to have effective representation. As the particulars were not given, the petitioner was deprived of his right to have the effective representation against the order. The instances about the offences noted in the order were not sufficient to brand him a dangerous person or to form a reasonable belief that maintenance of public order was adversely affected. The statements recorded are vague

and necessary particulars when wanting, the order is bad in law and is liable to be quashed.

4. Mr.U.R. Bhatt, the learned APP tenders the affidavit sworn in by Mr. G.R. Rajput. The same be taken on record though it is not on the point to be dealt with. Mr. Bhatt has vehemently refuted the allegations made, submitting that there is no delay on the part of the authority passing the order of detention, promptly order was passed and in the public interest, the certain facts & particulars are withheld.

5. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating non-disclosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the

detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference to a decision in the case of Bai Amina, W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others- 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujrat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

6. In view of such law, the authority passing the detention order has to satisfy the court that it was absolutely necessary in the public interest to withhold the particulars about the witnesses keeping their safety in mind. In this case, no explanatory affidavit has been filed so as to satisfy the court that the particulars of the witnesses kept uncovered and away from the petitioner, were required to be kept secret keeping the safety of the witnesses in mind. It seems, the authority passing the order assigned the task to his subordinate and felt satisfied with the order the subordinate made. He has it seems mechanically accepted assuming that every thing was done in right way. When that is so, the exercise of privilege cannot be upheld and consequently by suppressing the particulars about the witnesses, the right of the petitioner to make effective representation has been jeopardised and therefore the order is liable to be quashed and continued detention must be held unconstitutional.

7. For the aforesaid reasons, the application is

allowed. The order in question dated 30th September 1997 being illegal and unconstitutional is quashed and set aside and the petitioner is ordered to be released set at liberty forthwith if no longer required in any other case. Rule accordingly made absolute.

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*RMR.